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Supreme Court of the United States

OCTOBER TERM, 1945

No. 953

IN THE MATTER

of

LONG ISLAND UNIVERSITY,
Debtor,

JOHN P. McGRATH and JOSEPH O'CONNOR, Trustees in Reorganization of Long Island University, and LONG ISLAND UNIVERSITY, Debtor,
Petitioners,

v.

FRANK FOX,
Creditor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOHN P. McGRATH,
Attorney for Petitioners.

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To the Honorable the Chief Justice and to the Associate Justices of the Supreme Court of the United States:

Your petitioners, John P. McGrath and Joseph O'Connor, Trustees in Reorganization of Long Island University, Debtor, and Long Island University, Debtor, respectfully submit this petition for a writ of certiorari for the purpose of reviewing the decision of the United States Circuit Court of Appeals for the Second Circuit in the above entitled proceeding.

By its decision (Record I), the Circuit Court of Appeals reversed an order of the District Court for the Eastern District of New York (Record 2a). The decision of the Circuit Court and the order entered on that decision on December 19, 1945 (Record X) reversed the order of the District

Court and remanded the matter in accordance with its opinion. The District Court had ruled that a judgment entered in favor of Frank Fox in the office of the Clerk of County of Kings on January 14, 1943, in the sum of $79,268.80 was a nullity, holding that it was jurisdictionally defective and, therefore, subject to collateral attack. It denied the petition brought by Fox in the reorganization proceedings to have that judgment declared a valid lien on the proceeds of sale of real property sold by the Trustees during the reorganization proceeding and for payment of such lien.

An action had been instituted in the Supreme Court of New York, Kings County by the Brooklyn National Bank in March, 1942, against the debtor University. The claim of the plaintiff bank was assigned to Fox during the pendency of the action and after the University had defaulted, and had stipulated that it had no defense to the action and that the plaintiff bank might have judgment for the relief demanded in its complaint. Fox never became a party to this action and never made a motion to be substituted as plaintiff or be joined with the plaintiff, the bank, as required by Section 83 of the Civil Practice Act of the State of New York. On the affidavit of an attorney for the bank, the attorney for Fox, who had never been substituted in the action, entered the judgment in favor of Fox and against the University. The assignment was filed as part of the judgment roll (Record 25a).

The District Court ruled that the clerk was a mere ministerial officer without power to enter a judgment in favor of a stranger and one not a party to the action, no motion having been made to join or substitute Fox under Section 83 of the New York Civil Practice Act. It held that the clerk had only the power to enter a judgment in favor of a named plaintiff on default of a defendant under Section 485 of the Civil Practice Act (Record 5a, 6a).

The Circuit Court of Appeals disagreed with the District Court and held that the judgment was not jurisdictionally defective. It ruled that failure to comply with the

provisions of Section 83 of the Civil Practice Act was merely an oversight on the part of the parties or court officials and amendable under Section 109 (12) of the Civil Practice Act, or at most an omission or irregularity which a New York court must ignore or correct under Section 105 of the Civil Practice Act (Record III, IV). On this theory the Circuit Court ruled that Fox had a valid judgment lien and remanded the proceedings to the District Court for further proceedings with respect to defenses other than those involving the invalidity of the Fox judgment. The District Court had predicated its opinion solely on the jurisdictional invalidity of the Fox judgment and did not pass on other defenses raised by the answers to the Fox petition, by the trustees, the debtor and another judgment creditor (Record 5a, VIII).

Jurisdiction

The order of reversal was entered in the Circuit Court of Appeals on December 19, 1945 (Clerk's certified order, Record IX). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347a).

The Issues of Law Involved

This case presents squarely the legal problem of whether or not a judgment is jurisdictionally defective and a nullity, when entered in favor of the assignee of a claim during the pendency of an action instituted by the assignor, without being substituted as the plaintiff or joined as a plaintiff with the assignor by order of the court, as required by Section 83 of the New York Civil Practice Act. Concededly the issue depends on the local New York law as defined in its statutes and interpreted by its courts.

Collateral to this principal issue are other important questions. One of these is whether or not the clerk is a mere ministerial officer without power under New York law

to enter a judgment in favor of one not a party to the action and not named therein as the plaintiff, in violation of the specific provisions of Section 485 of the New York Civil Practice Act. Another is whether or not a defendant is deprived of "due process" where no order is obtained of substitution or joinder of the assignee as a plaintiff, under Section 83 of the Civil Practice Act, and no application for such substitution or joinder is made on notice to the defendant, thereby depriving the defendant of any opportunity to question the validity of the assignment and the prosecution of the claim to judgment in the hands of the assignee.

Is not more than a mere irregularity, omission or mistake involved where a complete stranger to the action, over whom the court has never acquired jurisdiction, causes a judgment to be entered in his favor by ignoring the mandatory and specific statutory requirements for becoming a plaintiff? These are the principal points of law which have arisen in this case as the result of the divergent decisions of the District Court and the Circuit Court in interpreting the applicable local law of New York, as set forth in the statutes of New York and the decisions of its courts.

Statement of Facts

The facts in this case are undisputed. In the main they are set forth in the opinions of the District Court and the Circuit Court. The claim on which the judgment was entered in favor of Frank Fox was based on a note given by Long Island University, the debtor, to the Brooklyn National Bank in 1936. The bank started suit on the note in the Supreme Court, Kings County, in March, 1942. The defendant University appeared in the action, admitted it had no defense to the note and stipulated that judgment might be entered against it without further notice in favor of the plaintiff bank (Record II).

The bank assigned the claim to Frank Fox on December 26, 1942, for $15,000.00, Fox being guaranteed against loss

by Jerome Thralls, a director and chairman of the liquidating committee of the bank (Record 17a, 18a). Judgment was entered in favor of Frank Fox and against the University by the Clerk of Kings County on January 14, 1943, in the sum of $79,268.80. The judgment fails to designate Frank Fox as the plaintiff (Record 25a). No further steps were taken to enforce the judgment after its docketing and in September, 1943, the University filed a voluntary petition for reorganization under Chapter X of the Bankruptcy Act (Record III).

It is conceded that if the Fox judgment is valid it was a lien on the real property of the debtor University when it went into reorganization and is a lien on the proceeds of sale of such real property. This real property was sold during the reorganization by the trustees upon refinancing of the first mortgage. Thereafter one Edmund F. Mulholland, to whom Fox had assigned the judgment, petitioned the District Court to declare the judgment a valid first lien against the proceeds of sale of the realty and for payment of the alleged lien. Answers were interposed by the trustees, the debtor and by another judgment creditor, but only the defenses involving the invalidity of the Fox judgment were passed upon by the District Court and the Circuit Court. These defenses were all substantially the same and set forth that the judgment was a nullity, jurisdictionally void and of no legal effect (Record 15a, 16a). During the trial of the claim the District Court granted a motion substituting Fox as the claimant and creditor in place of Mulholland, the judgment having been re-assigned by Mulholland to Fox (Record 3a). After the trial the District Court rendered its opinion finding that the judgment was a nullity (Record 13a). On that decision an order was entered denying the Fox motion on April 16, 1945 (Record 3a). On appeal to the Circuit Court of Appeals for the Second Circuit that court ruled that the judgment was not jurisdictionally defective and was a first lien on the proceeds of the realty (Record I). An order was entered in the Circuit Court on December 19, 1945, reversing the order of the

District Court and remanding the matter for further proceedings in accordance with its opinion (Record IX). The facts as to the action in the Supreme Court, Kings County, started by the Brooklyn National Bank, and the entry of the judgment, are a matter of record and were established by the introduction of the judgment roll and records of the Supreme Court. They are as follows:

1. No action was ever instituted against the debtor by Frank Fox.

2. The only action ever started with reference to the claim on which the Fox judgment is alleged to be based was an action instituted by the Brooklyn National Bank in the Supreme Court, Kings County, on or about March 10, 1942.

3. That the claim on which suit was instituted by the bank was assigned to Fox on December 26, 1942.

4. That Fox was not a party to the action instituted by the bank and was never made a party to that action. No order was ever obtained or even requested to substitute Fox as the plaintiff or to join him as a party plaintiff under Section 83 of the New York Civil Practice Act. No amended or supplemental pleading was ever served and no order for the service of such pleading was ever granted or even requested under Section 87 of the New York Civil Practice Act.

5. No judgment in the action started by the bank was ever entered by the bank, the plaintiff in that suit.

6. The summons and the complaint (Record 19a) in the bank's action were captioned "Brooklyn National Bank of New York, plaintiff, against Long Island University, defendant."

7. The attorneys of record for the plaintiff bank were Scudder, McCoun, Stockton & Kerfoot, Esqs. (Record

19a). There was never any substitution of attorneys for the plaintiff.

8. The judgment recites its entry "on motion of Lynn G. Goodhouse, attorney for the plaintiff," although Mr. "Goodhouse" never appeared in the action and had never been substituted as attorney for the plaintiff bank (Record 25a).

9. The judgment is in favor of "Frank Fox" and against "Long Island University, defendant." The judgment fails to designate Frank Fox as the plaintiff. It merely adjudges that Frank Fox, without describing him as the plaintiff, recover of Long Island University, the defendant, the sum of $79,248.75, with interest. It is unprecedented to omit from a judgment, after the name of the plaintiff, the word ", the **plaintiff,**". Long Island University was properly described as the defendant and there was apparently an intentional omission of the words ", the plaintiff," after the name of Frank Fox.

10. The judgment roll bore the caption of "Frank Fox, plaintiff, against Long Island University, defendant," and the name of Lynn G. Goodnough appeared thereon as attorney for plaintiff. The judgment was entered by Lynn G. Goodnough.

11. The only reference to the assignment of the claim by the bank to Fox, which assignment is dated December 26, 1942, is contained in the affidavit of regularity, verified on December 29, 1942. That affidavit recites the fact of the assignment and the assignment was filed as part of the judgment roll (Record 24a). Mr. Goodnough, as the attorney for Fox, prepared the judgment roll and entered the judgment.

12. The complaint of the plaintiff bank contains no reference to the assignment (Record 19a). The complaint was never amended and the claim was assigned after the suit was instituted.

The Reasons Relied on for the Allowance of the Writ

The Court below has decided an important question of local New York law in a way probably in conflict with applicable local decisions. The Circuit Court has decided that a judgment may be entered by a court clerk, a mere ministerial officer, in favor of one not a party to the action, to whom the claim in suit was assigned after the start of the action, without such stranger to the action becoming a party as required by the applicable New York statutes. Such a decision is in conflict with the local law of New York, as set forth in statutes specifically applicable thereto and in the decisions of the courts of New York.

The decision of the Court below denies to the defendant the opportunity to defend against the assignment, and thereby denies to such defendant the due process required by New York statutes and decisions. The ruling conflicts with New York statutes limiting the entry of judgment by the clerk to a judgment in favor of a named plaintiff. The opinion of the Court below further conflicts with the mandatory New York statutory requirements for proceeding with an action after the claim in suit has been assigned. Applicable New York decisions require a ruling that the Fox judgment is jurisdictionally defective and a nullity.

WHEREFORE, your petitioners respectfully pray that this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be granted.

Dated, Brooklyn, New York, March 13, 1946.

JOHN P. MCGRATH,
JOSEPH O'CONNOR,
Trustees in Reorganization of Long Island University, Debtor.

LONG ISLAND UNIVERSITY, *Debtor*,
by TRISTRAM WALKER METCALFE,
Dean,
Petitioners